Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1147

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, AND ALEX FULLER, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that this Court issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 16, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is set forth at p. 3a of the Appendix hereto. The Sixth Circuit has directed that its opinion not be reported.

The Sixth Circuit affirmed Orders of the United States District Court for the Eastern District of Michigan entered December 12, 1975 (Appendix, p. 19a) and June 17, 1976 (Appendix, p. 7a) ruling respectively that Petitioner could not intervene or bring a separate action to assert that two earlier Orders of the Court were invalid and were not binding upon Petitioner. Those two earlier Orders, entered July 29, 1974, and July 28, 1975, are set forth in the Appendix at p. 27a and p. 24a respectively.

JURISDICTION

The Judgment of the Court of Appeals was entered November 16, 1977. Notice of the entry of Judgment, pursuant to Rule 36 of the Federal Rules of Appellate Procedure, is set forth in the Appendix, at p. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does mandatory pregnancy leave violate Title VII of the Civil Rights Act of 1964?

2. Does Title VII require a state to pay unemployment compensation to women on mandatory pregnancy leave:

a. Is a state's unemployment compensation program subject to Title VII?

b. Do the Supremacy Clause and the doctrine under it of *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), require a state, despite a state statute specifying that

persons on leave are not to be considered unemployed, to pay unemployment compensation to women on mandatory pregnancy leave?

3. May a non-party to the proceeding in which a consent order was entered be barred, on the ground that it was not timely in moving to intervene, from bringing a separate action to establish that the consent order may not determine its legal rights?

4. Are the Due Process rights of an employer violated where its assessments to a state unemployment compensation fund will be increased, contrary to the state statute, on the basis of a consent order issued in a proceeding in which its rights were not represented and where it is barred from bringing a separate action to establish that the consent order cannot adversely determine its rights?

5. Should the decision below be reversed as a clear violation of (i) the specific requirements for bringing an action under Title VII, (ii) the established criteria for the grant of summary judgment under F.R. Civ. Pro. 56, and (iii) the requirements of Article III of the Constitution?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States:

Article III, Section 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . .

Article VI, second paragraph.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV, Section 1.

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

Statutes of the United States:

Title VII of the Civil Rights Act of 1964.
42 U.S.C. §2000e-2(a)

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. §2000e-5(f)(1)

. . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved.

Statutes of the State of Michigan:

Section 48 of the Michigan Employment Security Act, Mich. Comp. Laws §17.552.

. . . An individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer either at the request of the individual or pursuant to an agreement with his duly authorized bargaining agent, or in accordance with law.

Regulatory Provisions

Guidelines of the United States Equal Employment Opportunity Commission.

29 C.F.R. §1604.10(b)

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Federal Rules of Civil Procedure.

Rule 56(c)

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner operates factories and other facilities in the State of Michigan. Over the period 1967-1970, Petitioner introduced mandatory pregnancy leave for a specified period before and after delivery date — with respect to some of its employees at the request of Respondent UAW as a provision in their collective bargaining agreements, and for other workers as a unilateral policy.

The Civil Rights Act of 1964 became effective on July 2, 1965. The General Counsel of the United States Equal Employment Opportunity Commission issued informal opinions that Title VII of the Act did not require employers to treat pregnancy as if it were an illness. Nevertheless, in 1972, the EEOC issued Guidelines declaring that pregnancy must be treated as an illness under Title VII, 29 CFR §1604.10. These Guidelines have been declared by this Court in part to be inconsistent with Title VII (*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)) and in part to be validly issued (*Nashville Gas Co. v. Satty*, 46 U.S.L.W. 4026 (December 6, 1977)).

After the Guidelines were issued, in 1972 and 1973, Petitioner changed its policy and negotiated amendments in its collective bargaining agreements in order to eliminate the mandatory pregnancy leave provisions and thus conform to the Guidelines.

Section 48 of the Michigan Employment Security Act (MESA) provides that unemployment compensation is not to be paid to workers on leave for any of a number of sexually neutral reasons.

On July 16, 1973, Respondent UAW and certain individual employee-claimants (collectively, Claimants) filed suit in Federal District Court against the members and the Director of the Michigan Employment Security Commission and other persons who administer the unemployment compensation program (the State). The suit sought declaratory and injunctive relief precluding the application of Section 48 to employees on mandatory pregnancy leave and requiring the State to pay unemployment compensation to women on such leave.[1] This suit has come to be known in these proceedings as *UAW v. Taylor*.

The Complaint alleged, invoking the Court's Federal question jurisdiction, that the State's denial of benefits to these employees violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Federal unemployment laws, and Title VII of the Civil Rights Act of 1964. No employer was joined in the suit.

The State moved that the Complaint be dismissed because the Claimants had failed to join as defendants any employers and because such employers are indispensable parties under Fed. R. Civ. Pro. 19(a). This motion was never ruled upon. The State undertook no further defense of the case: it never answered the Complaint; it never filed a motion directed at the merits of the Complaint; it never filed a response to Claimants' motion for Partial Summary Judgment. Instead, the State agreed to the entry by the Court, on July 29, 1974, of an Order requiring the State to pay unemployment benefits to employees on mandatory

---

[1] Earlier, the Circuit Court of Wayne County, Michigan, had declared that Section 28 of the MESA, which unlike Section 48 applies specifically to women out of work due to pregnancy and provides that no unemployment compensation be paid to them for a specified period before and after delivery, is unconstitutional. *Goodman v. Chrysler*, 6 CCH Un. Ins. Repr. ¶9341 (Wayne Cir. Michigan No. 208-538, February 6, 1973). An employer was a party to that litigation.

pregnancy leave. This Order is known as the Consent Order.[2]

The Consent Order decreed that the State's denial, pursuant to MESA Section 48, of benefits to pregnant women on mandatory pregnancy leave was "contrary to Federal law," and it enjoined the State to pay "unemployment" benefits to these women. The Order did not explain how "Federal law" compelled its result. Indeed, it did not even specify which particular provision of "Federal law" was contravened by Section 48 — resting instead on its power to be silent.

The Consent Order required the MESC to "reopen, rehear and reconsider" claims of women on mandatory pregnancy leave which were denied from and after April 5, 1972. Since Petitioner had terminated mandatory pregnancy leave after the EEOC Guidelines became effective on that date, the Consent Order, by its terms, would not have significantly affected it. The Consent Order further stipulated that it did "not prejudice the rights or alleged rights of any employee-claimant who was denied MESA benefits between June 30, 1965 and April 5, 1972." It did not appear to determine whether such employees in fact had any rights, and the State interpreted it to require the payment of benefits only to women placed on leave after April 5, 1972.

[2]The State and the Claimants used this procedure even though a state court had only a few months before warned them that it was improper. The State and the UAW had agreed that another provision of MESA was unconstitutional, and asked the court to give judicial blessing to that agreement. The Michigan Court of Appeals refused to do so, because it recognized that it would "not be deciding a question but rather, merely obliging the litigants" without having before it "briefs and arguments on both sides of the controversy." Courts, it stressed, do not "enter decrees striking down acts of the legislature on the strength of stipulations signed by agreeable litigants." *Rozankovich v. Kalamazoo Spring Corp.*, 44 Mich. App. 426, 205 N.W.2d 311 (January 18, 1973). The District Court below did not observe this precept.

On July 28, 1975, however, the District Court entered another order upon the motion of certain Michigan civil service employees, specifying that the Consent Order required the payment of benefits to all claimants placed on leave after June 30, 1965. No employer (other than the State) was a party to the action even then. The effect of this Order was to expand the coverage of the Consent Order to include employees on leave over an additional seven-year period, thus substantially broadening its impact. It was not merely a matter of making seven additional years subject to the Order. During that period, Petitioner (and no doubt other employers) had maintained at the request of Respondent UAW a mandatory pregnancy leave policy in the belief, confirmed by the informal opinions of the EEOC General Counsel concerning pregnancy distinctions in employment and pregnancy leave in particular, that such a policy was entirely proper under Title VII, indeed, that pregnancy leave was required by Title VII. See, *e.g.*, EEOC General Counsel's letter of October 17, 1966, CCH Employment Practices Guide ¶17,304-43 (1970); EEOC Decision of December 16, 1969, CCH EEOC Decisions ¶6084 (1973).

Employment compensation in Michigan is funded from assessments paid by employers. An employer's assessments are substantially affected by the amount of benefits the State pays to that employer's workers. Because of the large number of workers placed on mandatory pregnancy leave between 1965 and 1972, Petitioner's assessments to the unemployment compensation fund will be substantially increased by the District Court's Orders, even though those Orders are incorrect and neither Petitioner nor any employer participated in the case.

On November 14, 1975, Petitioner, as well as General Motors Corporation, moved for leave to intervene in *UAW v. Taylor* for the purpose of dissolving the Orders of the

District Court and reopening the case to provide for the first time an adversarial presentation of the issues.

On December 12, 1975, the District Court denied these motions. The District Court held that Petitioner's motion to intervene should be denied on three grounds: Petitioner had actual notice of the suit and of the Court's orders; Petitioner was not "an indispensable or necessary party" to the case; and "intervention would not change the outcome" of the suit. With regard to this last proposition, the District Court observed that "[i]n light of *Turner v. Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (11/18/75) [423 U.S. 44], the court is convinced of the correctness of its prior orders in this case."

On March 31, 1976, Petitioner filed suit in the United States District Court for the Eastern District of Michigan against the MESC (and its members and its director) and against the UAW. The District Court had Federal question and diversity jurisdiction, as well as pendent jurisdiction. This suit is known as *Firestone v. Taylor*. Petitioner sought declaratory, injunctive, and other relief designed to prevent the Consent Order of July 29, 1974, as expanded by the Order of July 28, 1975, from applying to it and to have its rating account adjusted so that its assessments to the unemployment compensation fund would not be increased by benefits paid to its employees pursuant to those Orders.

By this Complaint (Appendix, p.9a), Petitioner alleged that:

1. The Orders were beyond the jurisdiction of the District Court to enter:

a. A single judge of the District Court had enjoined operation of a State statute as being violative of the U.S.

Constitution, contrary to the requirements of 28 U.S.C. §2281 (1970 ed.).[3]

The District Court's only explanation of the legal basis of its Order of July 29, 1974, was its citation (in its Order of December 12, 1975, denying Petitioner's motion to intervene) of *Turner v. Department of Employment Security*, 423 U.S. 44 (1975). Since *Turner* was decided solely under the United States Constitution, the District Court's explanation implied that it had enjoined application of MESA Section 48 on the ground that it violated the Constitution — an injunction then beyond the power of a single judge.[4]

b. There was no case or controversy within the meaning of Article III of the United States Constitution.

2. Even if the District Court had jurisdiction to enter the Consent Order, Petitioner's Complaint continued, the Order should be nullified because it erroneously interpreted and applied Federal law (for the reasons discussed in this Petition).

3. The Complaint further alleged that the State had breached its fiduciary duties to Petitioner and violated Petitioner's Constitutional rights by agreeing to the Consent Order and applying that Order to Petitioner.

The District Court dismissed Petitioner's Complaint by Order entered June 17, 1976, on the ground that the Consent Order "is *stare decisis* upon the Complaint herein, and . . . is correct on the merits."

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[3]This statute was repealed on August 12, 1976, 90 Stat. 1119. That repeal did not affect cases brought before then.

[4]Petitioner also alleged that even if *UAW v. Taylor* could have been lawfully decided under the Constitution, the State's determination not to pay unemployment compenstation to workers on leave, including pregnant women, does not violate the Constitution. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

By consolidated appeals, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit (i) the Order of December 12, 1975, denying its motion to intervene in *UAW v. Taylor* and (ii) the Order of June 17, 1976, granting summary judgment to Respondents and dismissing Petitioner's Complaint in *Firestone v. Taylor.*

By decision entered November 16, 1977, the Court of Appeals affirmed the District Court's Orders. It held that Petitioner's motion to intervene had not been timely filed. It also held that the Consent Order in *UAW v. Taylor* had been correctly decided under Title VII and that Petitioner had no right to bring a separate action to challenge the applicability of the Consent Order to it.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES IMPORTANT NEW ISSUES ABOUT THE INTERPRETATION AND SCOPE OF TITLE VII AND THE SUPREMACY CLAUSE.

The decision below rested on a finding that Title VII had been violated. The applicability of Title VII involves two possible analytical routes. Since neither the Sixth Circuit nor the District Court explained its decision, it is not clear which line the Sixth Circuit adopted. Each analytical approach raises substantial and important Federal questions concerning the interpretation, application and enforcement of Title VII. One approach, moreover, involves novel and important questions as to the scope and meaning of the Supremacy Clause of the Constitution.

A. A Holding that the State's Denial of Benefits Directly Violates Title VII Raises Important Issues This Court Should Consider.

The first explanation for the decision below is that the Sixth Circuit held that Title VII applies to payments of

social benefits by a state and invalidates the application of MESA Section 48 to women on mandatory pregnancy leave. Any such holding in this case must rest on two primary conclusions: that Title VII applies to state social welfare programs and that Title VII makes the application of Section 48 to those on pregnancy leave unlawful. These conclusions rest on novel, but unsound, interpretations of Title VII that warrant this Court's consideration.

1. This Court Should Consider the Conflict Between the Circuits as to Whether Title VII Applies to the Payment of Social Benefits by a State.

Title VII sweeps broadly by covering virtually all employer-employee relations. But Title VII has its limits: it only applies to employment practices of employers, employment agencies, and labor organizations. 42 U.S.C. §2000e-2.

Title VII does not apply to the payment of social benefits by a state. Even where the social benefits have some connection to an employment relationship, as with the payment of unemployment benefits, Title VII does not apply. There is nothing in Title VII which speaks to the acts of a state in its capacity as the administrator of social welfare programs.

To our knowledge, the only other Circuit to consider whether Title VII applies to the state's activities in distributing social benefits is the Fifth Circuit. That Circuit held explicitly that Title VII does not apply to state benefit programs, *Vick v. Texas Employment Commission,* 514 F.2d 734, *reh. denied,* 520 F.2d 944 (5th Cir. 1975). The Sixth Circuit in the decision below apparently reached a result directly contrary to that of the Fifth Circuit. Such a decision would be incorrect and in sharp conflict with the only other Circuit that has considered the issue. This issue raises important questions as to the scope of Title VII, not

only with regard to pregnancy but to all employment-related benefit programs.

2. A Decision of the Court Below that the Non-payment of Benefits to Women on Pregnancy Leave Violates Title VII is Contrary to this Court's Recent Decisions.

A decision below that the denial of unemployment compensation to women on pregnancy leave, pursuant to MESA Section 48, violates Title VII is contrary to this Court's recent construction of that statute in *Gilbert* and *Satty, supra.*

In *Gilbert* this Court held that the exclusion of pregnancy-related disabilities from a benefit program does not violate Title VII where the pregnancy exclusion is based on the fact of pregnancy and not on classification by gender, where there is no showing that the pregnancy exclusion is but a pretext for effecting invidious discrimination, and where there is no showing of sex-based discriminatory effects in the overall program. In the words of the Court, "gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive." 429 U.S. at 138-139.

MESA Section 48 defines who is unemployed for purposes of obtaining jobless benefits by excluding persons on leave. It is a provision which is facially neutral; it does not include the word "pregnancy" or any gender-based words. It is a provision which is facially reasonable: to limit unemployment benefits to persons who have lost their jobs and are not merely on leave. This limitation makes economic sense by limiting the cost of what is in any event an expensive, employer-funded program. It is a provision at least as reasonable as that upheld in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and in *Gilbert* (which placed considerable reliance on the *Geduldig* holding).

Satty reaffirmed *Gilbert* with respect to the validity of pregnancy exclusions from employee benefit programs. While the Court upheld Mrs. Satty's attack on her former employer's policy for determining seniority after she returned from pregnancy leave, it rejected her *Gilbert*-like claim that the employer's refusal to award sick-leave pay for pregnancy absences violated Title VII. *Satty* makes clear that a plaintiff can successfully attack an exclusion of pregnancy from a benefit package only if she demonstrates that the exclusion is a "mere pretext designed to effect an invidious discrimination against the members of one sex or the other." 46 U.S.L.W. at 4028.

MESA Section 48, however, is facially neutral. There is no evidence (or even an allegation) that its general denial of benefits to employees on leave is a "mere pretext" for invidious discrimination against women. In the terms of the Court's rejection of the seniority provision at issue in *Satty*, the payment of unemployment benefits is most certainly a "benefit" and not in any way the sort of "burden" which the Court there rejected.[5]

The decision of the Court below, if based on a determination that the non-payment of benefits to pregnant women violates Title VII, is in direct conflict with this Court's decisions in *Gilbert* and *Satty*.

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[5]In its brief *amicus curiae* filed with this Court in *Satty* jointly with the AFL-CIO, the UAW observed that the employer's seniority provision "affects the employment relationship permanently and fundamentally, rather than temporarily and tangentially." The UAW contrasted this with "the actuarial risk analysis underlying *Gilbert* and *Geduldig*." UAW Brief, p. 23. The State's refusal to pay unemployment benefits here is like the matters at issue in *Gilbert* and *Geduldig* and in the sick-pay portion of *Satty* and is not, in the UAW's terms, anything that "affects the employment relationship permanently and fundamentally."

B. A Holding that MESA Section 48 Is Preempted by Title VII Raises Similar Important Issues This Court Should Consider.

If the decision below does not rest on a holding that the application of MESA Section 48 directly violates Title VII, it must rest on the view that the application of Section 48 somehow impedes Title VII and thus is preempted by it. Such a holding would rest on two critical premises: mandatory pregnancy leave violates Title VII, and such a violation by the employer requires as a matter of Federal law preemption of MESA Section 48.

1. This Court Should Consider Whether, in light of *Gilbert* and *Satty*, Mandatory Pregnancy Leave Violates Title VII.

Gilbert and *Satty* leave open the substantial Federal question of whether a requirement that a pregnant employee take leave for a specified period shortly before and shortly after giving birth violates Title VII. That issue is squarely posed by the present case. While the issue has not been decided by this Court, the Sixth Circuit's apparent view that such leave is a violation would seem to conflict with the Court's analysis of Title VII pregnancy issues in *Gilbert* and *Satty*.

Gilbert upheld the validity under Title VII of pregnancy exclusions from benefit programs (at least where the exclusion was not a pretext for invidious discrimination) and *Satty* reaffirmed this holding. On the other hand, *Satty* also held that an employer's policy which strips a woman of seniority after pregnancy leave violates Title VII.

Satty distinguished the seniority provision from the legitimate nonpayment of benefits on three grounds. First, it distinguished between a "benefit" such as the disability program and a "burden" such as the loss of seniority. Second, it examined whether there was a proper business

justification for the employer's policy. Third, it found that while the portion of the EEOC's 1972 pregnancy Guidelines that applies to benefit exclusions was inconsistent with prior agency interpretations of the statute, that portion of the Guidelines that applies to the seniority issue was not.

It is not clear after *Satty* and *Gilbert* where the mandatory pregnancy leave issue lies. Is not such a leave a "benefit" (by preserving the women's job) rather than a "burden"? Even if it is a burden, is not it a permissible burden, particularly where there is sufficient business justification?[6]

Moreover, are the EEOC Guidelines, as applied to pregnancy leave, entitled to weight in light of the *Gilbert* and *Satty* analyses? Before it issued the Guidelines, the EEOC *required* employers to provide employees with pregnancy leave. CCH EEOC Decisions (1973 ed.) ¶6084 (EEOC Decision of December 16, 1969). If an employer was required to provide pregnancy leave, could he not for purposes of uniform and fair application and business planning provide that the leave must run for a certain specified period?

Thus, it appears from *Gilbert* and *Satty* and otherwise that mandatory pregnancy leave does not violate Title VII.[7]

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[6] In *Satty*, this Court said:

> "If a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company to apply these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policy may burden female employees."
>
> 46 U.S.L.W. at 4028

[7] Justice Stevens' concurrence in *Satty* suggests that *Gilbert* and *Satty* together hold that Title VII makes unlawful an employer's pregnancy-related policy only if that policy is one "which adversely affects a woman beyond the term of her pregnancy leave." 46 U.S.L.W. at 4031. The UAW suggested, as noted above at p. 15, just such an approach in its *amicus* brief in the *Satty* case. This test would sustain the validity of mandatory pregnancy leave, which is but a temporary interruption of employment.

But this important question has not been directly addressed by this Court, and the opinion below is a clear demonstration of the need for the Court to clarify the legality of mandatory pregnancy leave.

2. This Court Should Review the Extent to which the Decision Below Expands the Supremacy Clause Through an Extension of the *Nash* Doctrine.

The Claimants who brought *UAW v. Taylor* never sued any employer or made any claim against any employer. However, the claimants sought to apply Title VII by arguing that under *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), they had a valid cause of action against the State because the State's enforcement of MESA Section 48 impeded the enforcement of Title VII against miscreant private employers. The Court below apparently accepted this view — it is the only way (if *Vick* was followed) by which Title VII could be applicable to this case.

To reach this decision, the Court below had to conclude that Petitioner's mandatory pregnancy leave violated Title VII — a conclusion that, as *Gilbert* and *Satty* demonstrate, is not free from doubt. The Court had further to conclude that states are prohibited by the Supremacy Clause of the Federal Constitution from applying sexually neutral provisions delimiting the scope of their unemployment compensation programs to women whose Title VII rights have been violated by an employer — but must instead give those women special affirmative treatment in violation of state law. The decision of the Court below in effect requires the state to "make it up" to women whose employers violate Title VII, even if the "make up" is contrary to state law. The decision requires a state to exceed the parameters of its social benefit programs in order to provide assistance to ineligible persons whose Federally protected rights are

deemed to have been violated, not by the state, but by a private employer.

This approach extends *Nash* beyond all reasonable proportions and would interject Federal law farther into state matters than the Framers ever intended or this Court has ever permitted. To the extent the decision below was based on this analysis, it raises novel issues of major importance that require this Court's consideration.

By its terms, *Nash* was a straightforward Supremacy Clause case in the tradition of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). But this case is far removed from the circumstances that faced this Court in *Nash*. Mrs. Nash lost state benefits to which she was otherwise entitled solely because she filed a Federal claim. The Court held that the State "should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." 389 U.S. at 239. But the State's enforcement of MESA Section 48 to deny unemployment compensation to women on pregnancy leave in no way impeded the ability of those women to pursue their rights to file claims under Title VII; the denial of employment compensation to women on pregnancy leave had nothing to do with any attempt by them to exercise their Federal rights and did not impede their ability to pursue any Title VII claims against their employers. Unlike the Florida action against Mrs. Nash, the present case presents no coercive tie between the exercise of Federal rights and the eligibility for State benefits.

Nor does the denial of unemployment compensation encourage employers to violate Title VII (assuming *arguendo* that mandatory pregnancy leave violates the Act). Employers will be far more deterred by the risk of back-pay actions by employees wrongly put on leave than they will be encouraged to put them on leave by the fact that unem-

ployment compensation benefits will not then be paid. This is best demonstrated by the facts of this case: Petitioner ended its mandatory pregnancy leave policy after the EEOC Guidelines were promulgated, even though at that time the State would not have paid unemployment compensation to any women Petitioner placed on leave.

The Court below's extension of *Nash*, moreover, directly contravenes the explicit holdings of this Court that a state law will not be set aside unless the "subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); see also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

If *Nash* applies to the circumstances presented by this case, it will have been drastically extended, and the floodgates will have been opened to Federal cases challenging all manner of otherwise lawful state actions. Under the view of *Nash* taken below, a Federal Court should require a state to disregard the standards of its laws as necessary to enhance Federally created rights even if the state statute itself does not violate or impede Federal law. Pursuant to this analysis, the Supremacy Clause would judge a state statute not by whether it contravenes or impedes Federal law, but whether it carries out the presumed will of the central government. In short, the Supremacy Clause would require state law to assist and promote Federal law and the policies of the Federal Government. The implications of this holding are critically important to the future of Federalism.

II. THE HOLDING OF THE COURT PRECLUDING PETITIONER FROM BRINGING AN ACTION TO ESTABLISH THAT THE CONSENT ORDER IS NOT BINDING UPON IT IS ERRONEOUS.

The Court below held that because Petitioner did not timely intervene in *UAW v. Taylor*, it had no "clear right"[8] to bring a separate action to obtain a declaration and other relief establishing that it is not bound by the Consent Order, entered in a case to which it was not a party.

It is well established that a decree entered in a case in which a person is not a party cannot legally determine his legal rights. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 65 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977) (consent decree); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972).

Where a consent order adversely affects a non-party, he can take one of two courses: he can wait until the order is applied to him to challenge its application or he can bring a separate action to prevent that application. In this case, the latter course appeared more expeditious, since the application to Petitioner of the Consent Order is indirect, consisting of accounting entries made by the State followed at some indefinite time (depending on a number of other factors) by increased assessments to the unemployment compensation fund.

But the Court below ruled that Petitioner could not bring such an action because it had not timely intervened in *UAW v. Taylor*. In effect, therefore, it determined that a person must intervene in a case to avoid it adversely af-

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[8]Since the Court below affirmed dismissal of Petitioner's Complaint upon summary judgment, it apparently concluded that Petitioner did not have even an unclear right to bring it.

fecting his legal rights. This is directly contrary to the rule that a decree may not determine the legal rights of a person who is not a party. The ruling of the Court below would totally nullify the rule and prevent the non-party from having his day in court.

III. THIS ENTIRE PROCEEDING HAS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND HAS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

In three separate respects, the decision of the Court below has so departed from the accepted course of judicial proceedings, and sanctioned such a departure by the District Court, that this Court should grant the Petition and reverse the decision of the Court below.

First, the Court below completely ignored the standards for the grant of summary judgment. It found that Petitioner's interests had been adequately represented by the State, even though it was reviewing the grant of summary judgment and even though Petitioner alleged just the reverse. Quite clearly, this appellate fact-finding of a contested issue in a summary judgment determination was inappropriate.[9]

The finding of the Court below, moreover, was based on the legal conclusion that there is a presumption of adequate representation when a governmental body is charged with representing a non-party's interest. But Petitioner's suit was filed to prove that the State had not in fact carried out that obligation. Indeed the State's counsel had conceded

[9]The Court below also supported the grant of summary judgment by saying that while Petitioner alleged that its interests were not adequately represented, it did not "allege facts suggesting that its interests were not adequately represented." This is an erroneous standard on summary judgment, of course, and in any event factually erroneous. Petitioner's Complaint in *Firestone v. Taylor*, alleged the events of non-representation (see Paragraph 21, Appendix, p. 15a).

that it did not represent employers' interests: "I don't know where [Petitioner's] counsel gets the idea that the Attorney General represents the employers." "We represent the State of Michigan and the Commission in the matter and no employers necessarily."[10] Even if there were such a presumption as the Court below asserts, the existence of a presumption does not warrant dismissal by summary judgment of a suit brought to prove that the presumption was unwarranted on the facts of the particular case.

The extent to which the Court below misunderstood summary judgment is further demonstrated by its conclusion that "the district court did not abuse its *discretion* in entering summary judgment." (Emphasis added.)

Second, the Court below (and the District Court) ignored the procedural requirements of Title VII. Title VII contains a panoply of explicit preconditions for bringing suit. Before a person can bring a Title VII suit in Federal Court, she (or he) must first file a complaint with the appropriate state agency (if one exists) and with the EEOC. The exhaustion of these administrative remedies is a jurisdictional prerequisite to suit. Further, Title VII contains a specific statute of limitations. 42 U.S. §2000e-5. But the Claimants in *UAW v. Taylor* never brought proceedings before any state agency or the EEOC and did not satisfy the statute of limitations.

Third, the history of this proceeding demonstrates a pattern of deprivation of Petitioner's rights — raising significant Due Process and Article III questions:

1. The Consent Order was entered without any adversarial presentation of the issues, and without any representation of the interests of employers (who fund the unemployment benefits), and despite the fact that the

[10]Transcript of proceedings held in District Court December 9, 1975, p. 110; Joint Appendix in No. 76-1484, Sixth Circuit, p. 363.

parties had recently been warned by a state court not to undertake such a course. The entry of that Consent Order was void in that, under all the circumstances, the District Court did not have before it at the time it entered the Consent Order, a "case" or "controversy" within the meaning of Article III of the Constitution.[11]

2. The Consent Order was based upon completely unspecified "Federal law." In fact, there is no Federal law that supports the Consent Order.

3. The scope of the Consent Order was substantially revised and its cost to employers greatly expanded, in a subsequent order, again in which no employer participated.

4. When Petitioner moved, after the entry of the Order expanding the scope of the Consent Order, to intervene in order to litigate the validity of these Orders, its motion was denied.

5. Petitioner brought a separate action to establish the incontrovertible poisiton, *Provident Bank & Trust Co. v. Patterson, supra,* that one who is not party to a litigation cannot be bound by it and to obtain relief from the effects

[11]The Court below based its determination that there was a case or controversy on the statement that "the fact that *UAW v. Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States v. Board of School Commissioners,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973)." But the relevant inquiry is not merely whether there was a settlement, but whether the parties were in an adversarial posture before they ultimately settled the case.

In addition, the Consent Order itself actually proved there was no case or controversy. *Board of School Commissioners* held that a consent decree did not establish collusion because it "was the inescapable legal consequence of application of fundamental law to these facts." 466 F.2d at 575. That standard was clearly not met by the Consent Order: it was certainly not, as this Petition has amply demonstrated, an "inescapable legal consequence" that Section 48 of MESA was contrary to "Federal law."

of the Consent Order. But the District Court granted summary judgment against Petitioner on the ground that the Consent Order was *stare decisis,* although it has no legal basis and it is well established that "[b]eing a consent decree, it has little, if any, precedential value." *Ware v. Estes,* 328 F. Supp. 657, 659 (N.D. Tex. 1971), *aff'd,* 458 F.2d 1360 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

6. The Court of Appeals sanctioned without any legal justification this disregard of the law and of Petitioner's rights.

CONCLUSION

The decision below raises important questions of Federal law, and in several respects conflicts with the decisions of this Court and of other Circuits. It also departs from the accepted course of judicial proceedings.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 13, 1978

APPENDIX

[NOTICE OF ENTRY OF JUDGMENT BELOW]

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
JOHN P. HEHMAN FOR THE SIXTH CIRCUIT
CLERK CINCINNATI, OHIO 45202

November 16, 1977

Mr. Walter B. Connolly, Jr.
Mr. Francis J. Newton, Jr.
Mr. John A. Fillion
Mr. Frank J. Kelley
Mr. Robert A. Derengoski
Mr. John S. Hoff
Ms. Anna J. Diggs
Mr. A. L. Zwerdling
Mr. Ethan Vinson
Ms. Virginia McIntosh

Re: Case Nos. 76-1474, 76-1966-67 — International Union, et al., v. S. Martin Taylor, et al., Firestone Tire & Rubber Company, et al.

Gentlemen:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on appeal in Nos. 76-1966 and 76-1967. Appellees will recover their costs on appeal in No. 76-1474 as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

John P. Hehman, Clerk

By Betty Tibbles /s/
(Mrs.) Betty Tibbles
Deputy Clerk

BT:jl
Enclosure

[OPINION BELOW]

NOT FOR PUBLICATION

NO. 76-1474
NO. 76-1966
NO. 76-1967

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Nov. 16, 1977
John P. Hehman, Clerk]

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.	)	
Plaintiffs-Appellees (76-1474) Defendant-Cross-Appellant (76-1967)	)	
v.	)	
S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al.	)	
(76-1966) Defendants-Appellees (76-1474) Defendants (76-1967)	)	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
FIRESTONE TIRE AND RUBBER COMPANY, HAMILL MANUFACTURING CO. and FIRESTONE STEEL PRODUCTS COMPANY	)	
Petitioners for Intervention-Appellants (76-1474) Plaintiffs-Appellants (76-1966) Plaintiffs-Cross-Appellees (76-1967)	)	

Decided and Filed *November* 16, 1977

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge; and DUNCAN,* District Judge.

PER CURIAM. Appeals from final orders in two cases from the same district court have been consolidated. In No. 76-1474 Firestone appeals from an order denying its motion to intervene in an action (*UAW v. Taylor*) in which the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and various individuals were plaintiffs and the Michigan Employment Security Commission (MESC) and its director and members were defendants. Final judgment in *UAW v. Taylor* was entered by agreement of the parties on July 29, 1974. Firestone's motion to intervene was filed November 17, 1975.

In denying the motion to intervene for lack of timeliness the district court found that Firestone had "informal and actual notice" of the July 29, 1974 judgment and a subsequent order entered July 28, 1975. This finding is amply supported by the record. The district court found that Firestone was neither a necessary nor an indispensable party to *UAW v. Taylor*, which involved the validity under federal law of the practice of MESC of denying unemployment compensation to employees in Michigan who were forced to take leaves of absence due to pregnancy. We find no such compelling circumstances in this case as would require the district court to permit intervention after entry of final judgment. The district court did not abuse its discretion in denying intervention. *FMC Corporation v. Keizer Equipment Co.*, 433 F.2d 654 (6th Cir. 1970).

Approximately three months after it was denied intervention in *UAW v. Taylor*, Firestone filed an independent action in the district court seeking a declaratory judgment and injunctive relief (the second action). The

*The Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

defendants in the second action were MESC together with its director and members and the UAW. In No. 76-1966 Firestone appeals from entry of summary judgment for all the defendants in the second action. UAW cross-appeals in No. 76-1967 from the district court's denial of its motion to recover its expenses in defending the second action.

Firestone based its claim for declaratory and injunctive relief on three contentions: (1) that the district court in *UAW v. Taylor* enjoined the operation of §48 of the Michigan Employment Security Act (the Act) "on the ground that it violated the United States Constitution," a judicial act requiring a statutory three-judge court; (2) that there was no case or controvery in *UAW v. Taylor;* and (3) that MESC failed to represent Firestone's interests. An examination of the record in *UAW v. Taylor* refutes these claims.

Judge Joiner specifically refrained from finding §48 of MESC unconstitutional. Rather, he found that the practices of MESC in administering the Act violated federal law. The plaintiffs in *UAW v. Taylor* had specifically pled that contract clauses requiring mandatory leaves of absence for pregnancy, which MESC was enforcing in its denial of unemployment benefits, violated Title VII of the 1964 Civil Rights Act. Both the July 29, 1974 and the July 28, 1975 orders of the district court, which Firestone attacked in the second action, referred specifically to June 30, 1965, the effective date of the Civil Rights Act of 1964. As to Firestone's second contention, the fact that *UAW v. Taylor* was eventually terminated with a consent judgment does not indicate that there was no case or controversy between the parties. See *United States v. Board of School Commissioners*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

Finally, Firestone fails to allege facts suggesting that its interests were not adequately represented. Courts have recognized that ". . . a presumption of adequate represen-

tation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." (citations omitted). *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976). See *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84, 98 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3188 (1977). MESC has the authority to promulgate rules and regulations to carry out the provisions of the Act, M.C.L.A. §421.4; two of its four voting members represent employer interests, M.C.L.A. §421.3. Firestone does not claim that MESC acted in bad faith. Indeed, the record reveals competent representation by the Commission. That its efforts culminated in a consent decree is not evidence *per se* of inadequate representation. *United States v. Board of School Commissioners*, supra.

The district court decided the substantive issues in *UAW v. Taylor* which Firestone seeks to raise in the second action. At oral argument counsel for Firestone stated that the purpose of the second action is to get MESC and Judge Joiner to reexamine their positions. Having failed to make a timely motion to intervene in *UAW v. Taylor*, Firestone has no clear right to such a reexamination. The district court did not abuse its discretion in entering summary judgment for the defendants in the second action.

The judgments of the district court are affirmed on appeal and cross-appeal. The appellees will recover their costs on appeal in No. 76-1474. Each party will bear its own costs on appeal in Nos. 76-1966 and 76-1967.

[ORDER OF JUNE 17, 1976, DISMISSING PETITIONER'S COMPLAINT]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

THE FIRESTONE TIRE &
RUBBER COMPANY,
Plaintiff,

v. Civil Action
No. 670651

S. MARTIN TAYLOR, et al.
Defendants.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL AND DENYING MOTION FOR EXPENSES

At a session of said Court held in the
Federal Building, Detroit, Michigan
on the 17 day of June, 1976.

PRESENT: HONORABLE CHARLES W.
W. JOINER, DISTRICT JUDGE

Upon Motions submitted by the defendants, Briefs by counsel for all parties and after argument in open court,

IT IS HEREBY ORDERED AND ADJUGED as follows:

Upon stipulation by plaintiff, Keith Molin is hereby ordered dismissed as a party defendant in this action;

The Court, concluding that the Order of July 29, 1974, issued in *International Union, UAW, et al. v. Taylor, et al*, Civil Action No. 4-70066, is *stare decisis* upon the com-

plaint herein, and the Court concluding that *UAW v. Taylor* is correct on the merits, this Court hereby grants defendants motion for summary judgment and dismissal;

This Court hereby denies the motion by defendant International Union, UAW, for expenses.

Charles W. Joiner
District Judge

A True Copy:
Henry R. Hanssen, Clerk

Approved as to Form Only:

/s/ Michael J. Connolly
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[PETITIONER'S COMPLAINT]

[March 31, 1976]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

THE FIRESTONE TIRE & RUBBER COMPANY Plaintiff,	)	
v.	)	Civil Action No. 670651
S. MARTIN TAYLOR, DIRECTOR, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, FRANK PADZIESKI, WALTER CAMPBELL, RAYMOND M. LYONS, ALEX FULLER and KEITH MOLIN, MEMBERS OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA. Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTION AND OTHER RELIEF

NOW COMES the Plaintiff, by its counsel, and complains against the Defendants as follows:

1. Jurisdiction of this Court is based upon Sections 1331 and 1332 of the Judicial Code, 28 U.S.C. §§1331, 1332, the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure and upon the doctrine of pendent jurisdiction.

2. Venue of this action properly lies in this Court pursuant to Section 1391(b) of the Judicial Code, 28 U.S.C. §1391(b).

3. The Plaintiff is an Ohio corporation whose principal place of business is at 1200 Firestone Parkway, Akron, Ohio. Plaintiff does business in Michigan through its divisions Hamill Manufacturing Co. and Firestone Steel Products Co. and through its ownership of retail stores. It employs more than 2,000 persons within the State of Michigan. As an employer in Michigan, the Plaintiff is subject to the Michigan Employment Security Act ("MESA").

4. Defendant S. Martin Taylor, whose address is 7310 Woodward Avenue, Detroit, Michigan, is the Director of and ex officio member of the Michigan Employment Security Commission ("MESC"). Defendant MESC, the address of whose principal place of business is 7310 Woodward Avenue, Detroit, Michigan, is charged with the enforcement, operation and execution of the MESA. Defendants Frank Padzieski, Walter Campbell, Raymond M. Lyons, Alex Fuller and Keith Molin, whose addresses are: 15434 Michigan Avenue, Box 10, Dearborn, Michigan 48126; 1034 North Washington, Lansing, Michigan 48906; 10900 Harper, Detroit, Michigan 48213; 4046 Vicksburg, Detroit, Michigan 48204; and 300 E. Michigan Avenue, Lansing, Michigan 48926, respectively, are members of the MESC. All said defendants are sued in their official capacity and are referred to herein as the "State Defendants."

5. Defendant United Automobile Workers ("UAW") is a labor organization which is an unincorporated association whose principal place of business is 8000 East Jefferson Avenue, Detroit, Michigan. UAW represents and has represented as a plaintiff in the case in the United States District Court for the Eastern District of Michigan styled *United Automobile Workers, et al. v. Taylor, et al.* (Civil Action No. 4-70066) (hereinafter "UAW v. Taylor") its women members who are employees under the MESA.

6. The claims at issue herein arose in this District.

7. The amount in controversy in this action exceeds $10,000, excluding costs.

8. The MESA provides, *inter alia*, for the payment of unemployment benefits to persons who are unemployed and, after diligently attempting to find other work, have been unable to do so. The benefits paid are funded by mandatory assessments paid by Michigan employers. These assessments are calculated on the basis of the amount of benefits paid under the MESA to former employees of each employer. Thus, the contributions Plaintiff is and will be required to make under the MESA are proportional to the amount of benefits to which the State Defendants determine Plaintiff's former employees are entitled.

9. Section 48 of the MESA provides that a person on leave from his employment is not to be deemed unemployed for purposes of the Act and so is ineligible for benefits thereunder. This provision is included in the MESA in order to limit the costs of the program by excluding from eligibility for benefits persons who are not unemployed, but only on leave from their jobs.

10. The fund created by the MESA into which employer assessments are paid and out of which unemployment compensation benefits are paid is presently insolvent, and has been insolvent for approximately five years.

11. On July 29, 1974, the United States District Court for the Eastern District of Michigan issued an Order in *UAW v. Taylor*. A copy of this Order is attached hereto as Attachment A. This Order determined that application of Section 48 of the MESA to pregnant women violated "federal law" where they are not working because collective bargaining agreements contained mandatory pregnancy leave clauses or because employers unilaterally placed them on leave. The Court directed the State Defendants to pay MESA benefits to such pregnant women. On July 27, 1975, the aforesaid Court issued a further Order in *UAW v. Taylor*, expanding the relief granted by its 1974 Order.

12. Plaintiff was not a party to *UAW v. Taylor.* No party therein represented its interests, or those of any employer in the State of Michigan. The State Defendants (who were named as defendants in *UAW v. Taylor*) have conceded that they did not represent employers' interests. Plaintiff moved for leave to intervene in *UAW v. Taylor* on November 14, 1975, which motion was denied by the Court, per Joiner, J., on December 12, 1975.

13. As a result of the Orders issued in *UAW v. Taylor,* the State Defendants have paid and are continuing to pay unemployment benefits to pregnant employees not working at any time after June 30, 1965, because of mandatory pregnancy leave clauses in collective bargaining agreements or because of unilateral employer mandatory pregnancy leave policies; and, further, the State Defendants have engaged and continue to engage in a program of advertising and otherwise soliciting applications for benefits on the part of women who were not working because of such mandatory pregnancy leaves.

14. Defendant UAW, as part of its collective bargaining efforts in the late 1960's, requested that Plaintiff include provisions for mandatory pregnancy leave in the agreements between Defendant UAW and the Hamill Manufacturing Co. (a division of Plaintiff). Having previously voluntarily instituted such a policy, Plaintiff acceded to their request. The collective bargaining agreements between Hamill Manufacturing Co. and the UAW (beginning with an agreement effective December, 1967 for one plant in Michigan and with an agreement effective February, 1969 for the other plant in Michigan) each provided that pregnant women employees would be placed on leave from three months before the expected date of birth to six weeks after the birth. In addition, Firestone Steel Products Co. (a division of Plaintiff) instituted a like policy for its clerical employees in August of 1970. Beginning in April, 1972 and ending in July, 1973, Hamill Manufacturing Co. and

Firestone Steel Products provided that pregnancy leaves would not thereafter be mandatory.

15. Before Plaintiff changed its leave provision, it placed numerous women on mandatory pregnancy leave, who have received or will receive benefits being paid by the State Defendants pursuant to the Orders entered in *UAW v. Taylor.*

16. Such actions by the State Defendants are increasing and/or will increase Plaintiff's involuntary contributions under MESA by increasing the amount of benefits paid by the State Defendants that are charged to Plaintiff's rating account under MESA.

17. The Order issued by the Court in *UAW v. Taylor* on July 29, 1974, was based upon the Court's conclusion that Section 48 of MESA and the application of it by the State Defendants, which resulted in the denial of benefits under the MESA to women employees who are not working because of mandatory pregnancy leave provisions, "is unlawful as contrary to Federal law." Although the Order did not state on what provision of Federal law it was based, the Court subsequently explained that it was founded upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

18. No provision of Federal law, whether the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment, the Federal unemployment insurance statutes, Title VII of the Civil Rights Act of 1964 or any other provision, renders unlawful either (i) that part of Section 48 of the MESA which states that employees on leave are not eligible for unemployment compensation or (ii) the State Defendants' enforcement of that provision (prior to the Orders in *UAW v. Taylor*) by not paying unemployment compensation to pregnant employees not working because of mandatory pregnancy leave provisions. The Orders issued in *UAW v. Taylor* are based on an incorrect interpretation and application of Federal law.

19. By an Order entered December 12, 1975, denying Plaintiff's Motion to Intervene in *UAW v. Taylor*, Judge Joiner sought to buttress his Order of July 29, 1974, by citation of *Turner v. Department of Employment Security*, No. 74-1312, decided by the United States Supreme Court on November 17, 1975. *Turner* does not support the aforesaid Order of July 29, 1974, in that:

(a) A decision entered 16 months *after* the Order of July 29, 1974, cannot properly be invoked as a basis for that Order unless the Court reopens the case (which it refused to do).

(b) *Turner* in fact reaffirms the Supreme Court's prior decision that a social program may exclude benefits for pregnant women where, as is the case with the administration of MESA, such an exclusion is made for fiscal reasons.

20. The Court was without jurisdiction to enter the Order of July 29, 1974 (and the derivative Order of July 28, 1975) in that:

(a) The operation of a State statute may be enjoined on the ground that it violates the United States Constitution (the basis of the Order of July 29, 1974) only by a three-judge District Court, 28 U.S.C. §§2281.

(b) Because plaintiffs in *UAW v. Taylor* had alleged that MESA and its interpretation by the defendants named therein violated the United States Constitution (specifically, the Equal Protection Clause of the Fourteenth Amendment), a three-judge District Court was originally convened to hear the case. By Order dated September 20, 1973, that three-judge court, "*sua sponte*, having questioned whether the claim that the state statute involved is unconstitutional presents a substantial issue" concluded "that three judges are therefore not required to decide the merits of the case" and dissolved the three-judge court. It remanded the case to a single-judge court for determination of "whatever *other* federal grounds may be presented by the complaint"

(emphasis added). A copy of that Order is attached hereto as Attachment B.

(c) Nevertheless, Judge Joiner, the single judge to whom the case ultimately was referred, enjoined the operation of Section 48 of MESA on the ground that it violates the United States Constitution.

21. Further, the Order of July 29, 1974, is void and of no legal effect because *UAW v. Taylor* was not a case or controversy, as required by Article III, Section 2 of the Constitution, in that the defendants therein had no financial or other interest adverse to that of the plaintiffs and consequently failed to defend the action. Defendants never answered the complaint therein, or presented any brief or argument on the merits. Instead, they consented to the entry of the Order of July 29, 1974, so that the Court was deprived of the benefit of an adversary presentation. Consequently, for the reasons described above, the Order was erroneous as a matter of law and beyond the jurisdiction of the Court to enter.

First Cause of Action Against All Defendants

22. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

23. Any assessments by the State Defendants against Plaintiff for benefits paid by those Defendants pursuant to the Orders in *UAW v. Taylor* would be in violation of Federal law in that the Orders:

(a) are erroneous as a matter of law;
(b) are void; and
(c) were beyond the jurisdiction of the Court to enter.

Second Cause of Action Against All Defendants

24. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

25. Any assessments by the State Defendants against Plaintiff for benefits paid by those Defendants pursuant to the Orders in *UAW v. Taylor* would represent deprivations of Plaintiff's property in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution in that Plaintiff would be required to pay money as the result of Orders:

(a) which were entered in a case in which Plaintiff was not a party (despite its efforts to intervene) and in which Plaintiff's interests were not represented;

(b) which are erroneous as a matter of law;

(c) which are void; and

(d) which were beyond the jurisdiction of the Court to enter.

Third Cause of Action Against All Defendants

26. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

27. By failing to represent the interests of Plaintiff and other employers in Michigan and by failing to defend *UAW v. Taylor*, the State Defendants violated their duties to employers under MESA and violated Plaintiff's right under the Fifth and Fourteenth Amendments of the United States Constitution to (a) Equal Protection of the laws and (b) Due Process of law.

Fourth Cause of Action Against All Defendants

28. Plaintiff herein repeats and realleges the allegations contained in Paragraphs 1 through 21 hereof, with the same force and effect as though fully set forth herein.

29. By failing to represent the interests of Plaintiff and other employers in Michigan and by failing to defend *UAW v. Taylor*, the State Defendants violated their fiduciary duty to Plaintiff to ensure that benefits are paid only in accordance with the MESA and other applicable law.

WHEREFORE, the Plaintiff respectfully prays that this Court:

1. Adjudge, declare and decree, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, that Federal law does not invalidate Section 48 of MESA and does not require the State Defendants to pay benefits under the MESA to pregnant women who are not working because they are or were on mandatory pregnancy leave;

2. Adjudge, declare and decree, pursuant to the Declaratory Judgment Act, that the State Defendants may not include in the calculation of the amount Plaintiff is assessed under the MESA the benefits paid to women placed on mandatory pregnancy leave by Plaintiffs;

3. Permanently enjoin the State Defendants from including in the calculation of the amount Plaintiff is assessed under the MESA the benefits paid to women placed on mandatory pregnancy leave by Plaintiffs;

4. Order the State Defendants, pursuant to Section 16 of the MESA, to return to Plaintiff all contributions made by it on account of benefits paid pursuant to *UAW v. Taylor;*

5. Order the State Defendants, pursuant to MESA Sections 16 and 20, to adjust Plaintiff's rating account so that all charges to Plaintiff's rating account which have been made for benefits paid pursuant to *UAW v. Taylor* are reversed and credited to future proper charges to Plaintiff under the MESA, and so that Plaintiff's rating account will be in the same status as it would have been if no benefits had been paid pursuant to *UAW v. Taylor;* and, direct that the State Defendants apply to future proper assessments which may be due from the Plaintiffs under MESA all amounts by which its contributions under the MESA have increased because of the State Defendants' payment of unemployment benefits pursuant to the Orders in *UAW v. Taylor* to employees of the Plaintiff not working because there were or are on mandatory pregnancy leave;

6. Grant costs of suit to the Plaintiff; and

7. Grant such other and further relief as may appear to the Court to be equitable, just and proper.

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Dated: March , 1976

[Attachments Not Reproduced]

[ORDER DENYING PETITIONER'S MOTION TO INTERVENE]

[December 12, 1975]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, PATRICIA SCHENK, BETTY J. ARNOTT, DOLORES BIERI, JACQUELINE E. BOND, PATRICIA IGNASH, NANCY JANIK, JEAN PERUSKI, YVONNE REINKE, VIRGINIA M. SADRO, DELARAY V. SHAMKA, GLENDA SWARTZ, JUDITH M. WELLS, EVELYN ROZANKOVICH, SHIRLY ANN HALL, ELIZABETH RICHMOND, NANCY L. EBY, BARBARA KLIMAZEWSKI, ANTONIA POWELL WILSON, on behalf of themselves and on behalf of all women employees in Michigan,
Plaintiffs,

v.

Civil Action
No. 4-70066

S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al.,
Defendants.

ORDER

General Motors Corporation (GM) and the Firestone Tire & Rubber Company (Firestone) have filed motions to intervene in this action. GM also seeks clarification of the court's order dated July 29, 1974 and moves to vacate the court's order dated July 28, 1975. In conjunction with its motion to intervene, Firestone has filed motions to reopen

this case, to dissolve the court's orders, and to stay action until the court rules upon its motion to intervene.

The Employer's Unemployment Compensation Council (EUCC) has also filed a motion to intervene in order to participate as *amicus curiae*, and the Center for Urgan Law and Housing has likewise filed a motion for leave to file a brief as *amicus curiae*. The State Attorney General, on behalf of defendants, has filed a motion for interpretation and clarification of the court orders dated July 29, 1974 and July 28, 1975. Plaintiffs have filed briefs in opposition to the foregoing, accompanied by affidavits and exhibits.

After oral argument and upon consideration of the motions, briefs, exhibits, and affidavits, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. GM's and Firestone's motions to intervene are denied as untimely under Fed.R.Civ.P. 24; *see NAACP v. New York*, 413 U.S. 345, 365-67 (1973). Both GM and Firestone at the very least had informal and actual notice of this suit and of the court's orders dated July 29, 1974 and July 28, 1975. Neither GM nor Firestone is or was an indispensable or necessary party to this suit. Moreover, intervention would not change the outcome of this suit. In light of *Turner v. Department of Employment Security & Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (11/18/75), the court is convinced of the correctness of its prior orders in this case.

2. The court's orders dated July 29, 1974 and July 28, 1975 were intended to distinguish between two groups of women employees denied MESA benefits solely due to mandatory maternity leave contract clauses and to leaves of absence or terminations unilaterally imposed due to employer policies: those women forced out of work between June 30, 1965 and April 5, 1972; and those women forced out of work after April 5, 1972. With regard to the latter group, the defendants had the burden of initiating the examination, hearing, rehearing, and reconsideration of

claims in the light of the July 29, 1974 order. With regard to the former group, the claimants themselves had the burden of initiating the examination, hearing, rehearing, and reconsideration of claims.

The law applicable to both groups is the same:

> "[T]he practice of denying benefits under the Michigan Employment Security Act to women employees, who are forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employer policies, is unlawful as contrary to Federal law."

Order of July 29, 1974.

Moreover, as declared in the court's order of July 28, 1975:

> "[T]he MESC Instructions to Branch Offices of August 30, 1974, concerning implementation of this Court's order of July 29, 1974, [are to] be applied to the benefit of Petitioners and all others in their position. . . ."

The "forced out of work" language employed in the court's order embraces those class members who have been terminated from employment or discharged because of pregnancy in addition to those claimants subject to mandatory leaves of absence because of contracts or unilateral employer policies.

3. The issue is raised that the orders are violative of the statute of limitations. The Michigan Employment Security Act does not contain a statute of limitations as such. In addition, any defense to this suit predicated upon the statute of limitations has long since been waived. The terms of the court's order dated July 29, 1974 which defined the lower limit of the class as including women forced out of work on or after June 30, 1965 were the product of the parties' arms-length settlement negotiations approved by the court.

4. The defendant MESC's Instructions to Branch Offices of August 30, 1974, appropriately capture the intent of the court's order of July 29, 1974. Those instructions, with regard to the certification requirements imposed upon class members filing retroactive claims for benefits and reflected in MESC Form 1276, accord with the court's view of how the "seeking work" and "availability" requirements imposed by section 28 of the MESA, MCLA 421.28, should be met.

MESC Form 1276 provides, in pertinent part, as follows:

> "CERTIFICATION: I hereby certify that during the week(s) indicated opposite my signature, and except as otherwise shown below or reported by me to this Commission:
>
> (1) I was registered for and seeking work or I did not register and did not seek work because I was on a mandatory maternity leave of absence and understood I was ineligible for benefits . . .
>
> (3) I was *able* and *available* to perform full-time work. . . ."

Although this certification requirement for class members differs from requirements imposed upon non-class members, it is appropriate for the defendants to use different standards for assessing the claims of class members under section 28 of MESA. Class members have been denied employment because of mandatory maternity leave policies or contract clauses which are contrary to law and as a result the procedures set forth in the instructions are the only procedures that should reasonably be required of claimants to show compliance with section 28 of the Act.

5. Defendant Taylor is hereby authorized after January 1, 1976 to set a date by which class members must file retroactive claims for benefits. The date so set should provide at least 60 days' notice from the date notice is

publicly given to members of the class as defined below. The notice of the date set should be publicized throughout the state by an appropriate press release and by notices posted in defendants' branch offices at least 60 days prior to the date set as the cut-off date.

6. The defendants are hereby required to reopen, rehear, and reconsider, in the light of this and prior orders, all claims by members of the class denied since July 29, 1974 and not later granted for reasons inconsistent with the court's orders and the MESC Instructions to Branch Offices of August 30, 1974.

7. The EUCC's motion to intervene as *amicus curiae* is denied. The Center for Urban Law and Housing's motion for leave to file a brief is likewise denied. The parties have more than amply explored the issues before the court, and disposition of this action renders help from *amici* unnecessary.

So ordered.

Charles W. Joiner /s/

CHARLES W. JOINER
United States District Judge

Dated: December 12, 1975
Detroit, Michigan

[ORDER OF JULY 28, 1975]

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al, PATRICIA SCHENK, BETTY J. ARNOTT, DOLORES BIERI, JACQUELINE E. BOND, PATRICIA IGNASH, NANCY JANIK, JEAN PERUSKI, YVONNE REINKE, VIRGINIA M. SADRO, DELARAY V. SHAMKA, GLENDA SWARTZ, JUDITH M. WELLS, EVELYN ROZANKOVICH, SHIRLY ANN HALL, ELIZABETH RICHMOND, NANCY L. EBY, BARBARA KLIMAZEWSKI, ANTONIA POWELL WILSON, on behalf of themselves and on behalf of all women employees in Michigan,

Plaintiffs

-v- CIVIL ACTION NO. 4 70066

S. MARTIN TAYLOR, Director, and the Michigan Employment Security Commission, et al,

Defendants

ORDER GRANTING MOTION OF PETITIONERS

On motion of Petitioners, female employees in the Civil Service of the State of Michigan, by and through their attorneys, Zwerdling, Maurer, Diggs and Papp, that they be afforded all relief appropriate to membership in the class embraced by this Court's Order and Judgment of July 29, 1974; the Court having examined said Motion, Defendants' Answer thereto; the pleadings filed by Plaintiff UAW in support of Petitioners herein; the Briefs filed by counsel, and the files in the matter; and having heard argument by

counsel for all parties, and being fully advised in the premises; and it appearing to the Court that Petitioners' Motion should be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. That this Court's Order of July 29, 1974 was intended to, and by its plain language did, relate to a class of persons including all women forced out of work in Michigan due to pregnancy subsequent to June 30, 1965, whether State of Michigan employees or not; and that the class, therefore, includes these Petitioners, and all persons in their position.

2. That this Court finds no merit in Defendants' argument that the Eleventh Amendment of the U.S. Constitution prohibits this Court from adjudicating the entitlement of Petitioners, as State employees, to unemployment compensation benefits.

3. That the MESC Instructions to Branch Offices of August 30, 1974, concerning implementation of this Court's Order of July 29, 1974, be applied to the benefit of Petitioners and all others in their position, whom this Court hereby finds to be members of the class represented by Plaintiffs herein, in accordance with its Opinion as rendered from the Bench on hearing of this matter on July 14, 1975.

/s/ Charles Joiner,

Hon. Charles Joiner,
U.S. District Judge

Notice of Entry Waived
APPROVED:

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Attorney for Defendants
By: /s/ E. J. Setlock
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[ORDER OF JULY 29, 1974]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al,
Plaintiffs,

v.

Civil Action
No. 4-70066

S. MARTIN TAYLOR, Director, and the MICHIGAN EMPLOYMENT SECURITY COMMISSION, et al,
Defendants.

ORDER AND JUDGMENT

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, this day of , 1974.

PRESENT: HONORABLE CHARLES JOINER
U.S. DISTRICT JUDGE

Upon plaintiffs' Complaint, attachments to said Complaint, and Motion for Partial Summary Judgment, upon submission of this Order and Judgment by plaintiffs, after extensive conferences in Chambers, upon notice to members of the class named in plaintiffs' Complaint, and after a hearing in open Court, and the Court being fully advised in the premises:

NOW THEREFORE, it is hereby ordered and adjuged as follows:

I. It is declared that the practice of denying benefits under the Michigan Employment Security Act* to women employees, who are forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employer policies, is unlawful as contrary to Federal law. This Court expressly does not rule upon the validity of Section 48, MESA, or the leave of absence portion of said Section.

II. Defendants, their successors in office, agents and employees are hereby enjoined from denying benefits under the MESA to women employees solely due to their having involuntarily been placed on "leaves of absence" under said maternity leave clauses in contracts or unilateral employer policies.

III. Defendants, their successors in office, agents and employees are ordered to reopen, rehear and reconsider, in light of this Order and Judgment, the claims of all employees-claimants denied MESA benefits from and after April 5, 1972, solely due to such mandatory maternity leave contract clauses and to such "leaves of absence" unilaterally imposed due to employer policies. It is hereby ruled that said claims may be reopened under the MESA, because the issue in question — i.e., the lawfulness of said contract clauses and the State practice in relation thereto — was not heretofore "disputed" within the MESA. This Order does not prejudice the rights or alleged rights of any employee-claimant, who was denied MESA benefits between June 30, 1965 and April 5, 1972, to on her own individually request the MESC for benefits which had been denied because of said maternity leave policies.

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*Mich. Comp. Laws, Secs. 421-1 *et seq.*: Mich. Stats. Ann. Secs. 17.501, *et seq.*: hereinafter usually referred to as "MESA".

Approved:

/s/ Charles Joiner
Hon. Charles Joiner
U.S. District Judge

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